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No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

CSX CORPORATION and
CSX TRANSPORTATION, INC.,

Petitioners,

v.

FOLKSTONE MARITIME, LTD.
and M/V PONTOKRATIS,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Does a federal appellate court have jurisdiction and the power to review and raise an insufficient bond posted for the release of an arrested vessel after the arrested vessel has been accidentally or improperly released from the marshal's custody?

2. Does a federal appellate court have jurisdiction and the power to review and raise an insufficient bond posted for the release of an arrested vessel where the owner of the vessel has filed suit as plaintiff submitting itself *in personam* to the jurisdiction of the court?

3. Does the setting of a bond for the release of vessel in an admiralty case involve a substantive right to seek redress so that the provisions of 28 U.S.C. sec. 2464 should take precedence over the provisions of Fed.R. Civ.P. Supplemental Rule E(5)(a)?

4. Should equitable principles in admiralty law require the application of the provisions of Section 2464 over the provisions of Rule E(5)(a) when the damage caused by the vessel exceeds the value of the ship?

5. Should the provisions of Rule E(5)(a) be construed to require that the release bond be set in an amount equal to the value of the undamaged vessel in its condition before the collision?

LIST OF PARTIES AND RULE 28.1 LIST

The parties to the proceedings below and before this Court are the petitioners, CSX Corporation and CSX Transportation, Inc., and the respondents, Folkstone Maritime, Ltd. and the M/V Pontokratis.

CSX Transportation, Inc. is a wholly owned subsidiary of CSX Corporation. CSX Corporation does not have a parent corporation.

Pursuant to Rule 28.1, CSX Corporation and CSX Transportation, Inc. have direct or indirect interests in the following subsidiaries and affiliates:

- Akron Union Passenger Depot Company, The
- Augusta and Summerville Railroad Company
- Beaver Street Tower Company
- Central Transfer Railway and Storage Company
- Chatham Terminal Company
- Dayton and Michigan Railroad Company
- Home Avenue Railroad Company, The
- Lakefront Deck and Railroad Terminal Company, The
- North Charleston Terminal Company
- Richmond-Washington Company
- RF&P Corporation
- Baltimore and Cumberland Valley Railroad Extension Company, The
- Winston-Salem Southbound Railway Company
- Woodstock and Blockton Railway Company
- Energy Dominion
- Gemetal Distribution Services Company
- Yukon Pacific Corporation

— Globe Road Associates
— Globe Road II Associates
— Globe Road III Associates
— Glenway Associates
— James Center Hotel Associates
— Northeast Associates
— One James Center Associates
— Pere Marquette Associates
— Richmond Center Associates
— Richmond Center Associates II
— Richmond Center Hotel Properties
— St. George Sea Port Associates
— Second Street Limited Partnership

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In The

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October Term, 1988

CSX CORPORATION and
CSX TRANSPORTATION, INC.,

Petitioners,

v.

FOLKSTONE MARITIME, LTD.
and M/V PONTOKRATIS,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The petitioners, CSX Corporation and CSX Transportation, Inc., respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit, entered in the above-entitled proceeding on January 26, 1989 and March 9, 1989.

OPINIONS BELOW

The March 9, 1989 Order of the Court of Appeals for the Seventh Circuit denying CSX's Petition for Rehearing has not been reported, and is reprinted in the appendix

hereto, page 7a, *infra*. The opinion of Court of Appeals for the Seventh Circuit dismissing the appeal has not been reported, and is reprinted in the appendix hereto, page 1a, *infra*.

The May 27, 1988 Minute Order, and the June 2, 1988 Minute Order and Amended Memorandum Opinion and Order of the United States District Court for the Northern District of Illinois, Eastern Division (Rovner, D.J.) have not been reported. These orders are reprinted in the appendix hereto, page 9a and page 10a, respectively.

JURISDICTION

On May 6, 1988, there was a collision between the M/V Pontokratis owned by Folkstone Maritime, Ltd. and a single leaf bascule bridge owned by CSX Transportation, Inc., which spanned the Calumet River in Chicago, Illinois. Since the bridge spanned United States navigable waters, the district court had jurisdiction pursuant to 28 U.S.C. sec. 1333.

As a result of the district court's decision to apply the provisions of Fed.R.Civ.P. Supplemental Rule E(5)(A) (hereinafter Rule E(5)(A)) instead of the provisions of 28 U.S.C. sec. 2464 (hereinafter Section 2464) in setting the amount of the release bond, that issue was appealed to the Seventh Circuit pursuant to 28 U.S.C. sec. 1291 under the collateral order doctrine. Alternative jurisdiction for the appeal was pursuant to 28 U.S.C. sec. 1292(a) as an appeal from an order denying injunctive relief in an admiralty proceeding.

On January 26, 1989, the Seventh Circuit dismissed the appeal holding that the bond issue raised was moot because the ship had been released from arrest and it was unable to enforce an increase in the bond. On February 3, 1989, a Petition for Rehearing was filed. On March 9, 1989, the Seventh Circuit denied the Petition for Rehearing.

The jurisdiction of this Court to review the judgment of the Seventh Circuit is invoked under 28 U.S.C. sec. 1254(1).

STATUTES INVOLVED

28 U.S.C. sec. 2464

> (a) Except in cases of seizures for forfeiture under any law of the United States, whenever a warrant of arrest or other process in rem is issued in an admiralty case, the United States marshal shall stay the execution of such process, or discharge the property arrested if the process has been levied, on receiving from the respondent or claimant of the property a bond or stipulation in double the amount claimed by the libellant, with sufficient surety, to be approved by the judge of the district court where the case is pending, or, in his absence, by the collector of the port, conditioned to answer the decree of the court in such case. Such bond or stipulation shall be returned to the court, and judgment or decree thereon, against both the principal and sureties, may be secured at the time of rendering the decree in the original case. The owner of any vessel may deliver to the marshal a bond or stipulation, with sufficient surety, to be approved by the judge of the district court, conditioned to answer the decree of such court in all or any cases that are brought there-

after in such court against the vessel. Thereupon the execution of all such process against such vessel shall be stayed so long as the amount secured by such bond or stipulation is at least double the aggregate amount claimed by libellants in such suits which are begun and pending against such vessel. Similar judgments or decrees and remedies may be had on such bond or stipulation as if a special bond or stipulation had been filed in each of such suits.

Fed.R.Civ.P. Supplemental Rule E(5)(a)

(5) Release of Property

(a) Special Bond. Except in cases of seizures for forfeiture under any law of the United States, whenever process of maritime attachment and garnishment or process in rem is issued the execution of such process shall be stayed, or the property released, on the giving of security, to be approved by the court or clerk, or by stipulation of the parties, conditioned to answer the judgment of the court or of any appellate court. The parties may stipulate the amount and nature of such security. In the event of the inability or refusal of the parties so to stipulate the court shall fix the principal sum of the bond or stipulation at an amount sufficient to cover the amount of the plaintiff's claim fairly stated with accrued interest and costs; but the principal sum shall in no event exceed (i) twice the amount of the plaintiff's claim or (ii) the value of the property on due appraisement, whichever is smaller. The bond or stipulation shall be conditioned for the payment of the principal sum and interest thereon at 6 per cent per annum.

28 U.S.C. sec. 2072

Rules of Civil Procedure

The Supreme Court shall have the power to prescribe by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts and courts of appeals

of the United States in civil actions, including admiralty and maritime cases, and appeals therein, and the practice and procedure in proceedings for the review by the courts of appeals of decisions of the Tax Court of the United States and for the judicial review or enforcement of orders of administrative agencies, boards, commissions, and officers.

Such rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution.

Such rules shall not take effect until they have been reported to Congress by the Chief Justice at or after the beginning of a regular session thereof but not later than the first day of May, and until the expiration of ninety days after they have been thus reported.

All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect. Nothing in this title, anything therein to the contrary notwithstanding, shall in any way limit, supersede, or repeal any such rules heretofore prescribed by the Supreme Court.

STATEMENT OF THE CASE

On Friday, May 6, 1988 at 8:06 p.m. the M/V Pontokratis, a vessel owned by plaintiff, Folkstone Maritime, Ltd. ("Folkstone"), a Cyprus corporation, collided with a railroad draw bridge owned by defendants, CSX Corporation and CSX Transportation, Inc. ("CSX") while navigating the Calumet River in Chicago. Folkstone instituted this action *in personam* on May 9, 1989, the following Monday morning at 10:18 a.m. claiming that CSX was negligent in building and operating the bridge. CSX filed an Answer

and a Counterclaim alleging that Folkstone was negligent in the operation of its vessel. The Counterclaim also requested the arrest of the vessel. A warrant for its arrest was issued on May 18, 1988.

Folkstone then requested that a release bond be set in an amount not to exceed the appraised value of the vessel pursuant to Rule E(5)(a). CSX requested that the release bond be set pursuant to Section 2464 which requires an amount at twice the value of defendant's damages. However, for equitable reasons, CSX offered to accept a bond in the amount of 15 million dollars rather than insisting upon the full amount of 24 million dollars.

On May 20, 1988, a hearing was held to determine the value of the vessel, and the cost of replacing the bridge which was destroyed in the collision.

Leonidas Moustakas and Demetri Antippas testified on behalf of Folkstone. Moustakas, employed in managing ships and negotiating their purchase, testified that the Pontokratis, with a deadweight of 29,550 tons, was built in 1980 or 1981 at a cost of $13,000,000. The owners insured the ship for $10,000,000. The Pontokratis had a present value of $8,000,000 based upon sales of comparable ships. He further testified that the damaged vessel would cost from $250,000 to $1,000,000 to tow to a shipyard for repairs. The total cost of repair including the towage would be from $3,000,000 to $3,500,000 and there would be additional costs while the ship was dry docked of $250,000 to $300,000.

Antippas, a supervisor of new shipbuilding and of purchasing second hand vessels, stated that the Pontokratis had a present sound value of $7,982,000. It would cost $14,000,000 to build that vessel today. The lowest towing bid was $250,000, and the lowest repair bid was $3,350,000 in Canadian dollars. There would be additional costs of

$25,000 to $30,000 to prepare the ship for towing and of $150,000 for added crew costs.

CSX presented three witnesses at the hearing. David Novick, an engineer who designed bridges, testified that the cost of replacing the single leaf bascule bridge destroyed in the collision would be $12,100,000. The replacement process would take approximately two years. The bridge was built in 1911, and his estimate was based upon replacement costs.

Stephen K. Ramsey, a CSX engineer, testified that CSX would spend approximately $1,060,000 in freeing the vessel from the bridge which was enmeshed in the superstructure of the ship, and in removing the bridge.

Harry Ottaway, a ship appraiser, testified that the Pontokratis had a sound value in May, 1988 in the amount of $9,000,000 based on current ship sales. He arrived at that figure by considering six recent ship sales of comparable ships and adjusting those sales figures to take into account such factors as age and speed. Those sales ranged from $8,300,000 to $10,000,000, with an average of $9,000,000. The market for ships is somewhat dependent on the freight market, and the ship market rose after the date of the occurrence. A ship of 33,891 deadweight tons sold for $18,000,000 in May of 1988.

On May 27, 1988 the district court ruled that the amount of the bond was controlled by Rule E(5)(a) and not Section 2464. The court further interpreted Rule E(5)(a) as requiring the release bond to be in the amount of the fair market value of the ship *after* the accident. Therefore, the bond was set at $4,580,000 ($8,000,000 fair market value of ship less repairs and towing of $3,420,000). CSX's Motion for Reconsideration was denied on June 2, 1988. CSX appealed that decision to the Seventh Circuit on June 3, 1988.

On June 9, 1989 Folkstone moved to have the vessel released pursuant to its Writ of Restitution. The district court denied that motion believing it had lost jurisdiction by virtue of CSX's appeal. Pursuant to Folkstone's emergency appeal on June 15, 1988 the Seventh Circuit reversed the district court's ruling that it had lost jurisdiction and ordered that court to rule on the Writ of Restitution.

On June 16, 1988 there was a flurry of activity. First, the district court granted Folkstone's Writ of Restitution and ordered the release of the vessel. CSX immediately filed a Motion to Stay that order pending the appeal of the amount of the bond. In its Motion, CSX offered to pay a bond to protect Folkstone's loss of the use of its vessel during the appeal. The Motion to Stay was denied by the district court. CSX immediately filed an Emergency Appeal to the Seventh Circuit to prevent the vessel's release until such time as the amount of the bond had been reviewed. The Seventh Circuit rejected that Emergency Appeal by an order issued late in the afternoon of June 16. The M/V Pontokratis then sailed for Duluth on that day to pick up a load of grain consigned to Poland.

Still pending before the Seventh Circuit was the issue of whether the trial court properly utilized Rule E(5)(a) as opposed to Section 2464 in setting the bond, and whether the trial court properly used the fair market value of the ship after the accident as opposed to its pre-accident value in interpreting Rule E(5)(a). After these issues were fully briefed, the Seventh Circuit dismissed the appeal on January 26, 1989 holding that the issue of the bond was moot since the vessel had been released. The Seventh Circuit explained in its opinion that neither it nor the district court had the power to bring the vessel back nor the power to enforce an increased bond even if the issue on the merits was decided in CSX's favor.

On February 3, 1989 CSX filed a Petition for Rehearing with the Seventh Circuit pointing out that the jurisdic-

tion over the bond issue was not lost (i) if the vessel had been mistakenly or improperly removed from the marshal's custody and (ii) where the owner of the ship was present before the court *in personam*. The Petition for Rehearing also explained that both the district court and the Seventh Circuit had denied CSX's request to stay the release of the vessel. *See* appendix pp. 20a and 21a. As a practical matter, in dismissing the appeal, the Seventh Circuit was now relying on its earlier refusal to stay the release as a basis for claiming the issue was moot. Thus, CSX was placed in a classic "Catch 22" situation.

On March 9, 1989 the Seventh Circuit denied CSX's Petition for Rehearing. CSX is now filing this Petition for Writ of Certiorari.

REASONS FOR GRANTING THE WRIT

I.

THE SEVENTH CIRCUIT'S DECISION TO DISMISS THE APPEAL ON THE BOND ISSUE IS IN CONFLICT WITH THE DECISION OF THE UNITED STATES SUPREME COURT AND THE DECISIONS OF OTHER CIRCUITS WHICH HOLD THAT JURISDICTION IS NOT LOST WHERE THE *RES* IS ACCIDENTALLY OR IMPROPERLY RELEASED, OR WHERE IT IS DELIVERED TO A PARTY UPON SECURITY.

Without reaching the merits of the dispute between the bond setting provisions of Section 2464 and Rule E(5)(a), the Seventh Circuit dismissed CSX's appeal. The appellate court stated that because the ship had been released and had left the jurisdiction of the court, that it had no power to compel Folkstone to raise the bond even if the issue were decided in favor of CSX. Therefore, the appeal was moot.

The Seventh Circuit's holding is in conflict with a prior decision of the United States Supreme Court and of other circuits. In *The Rio Grande v. Otis*, 90 U.S. (23 Wall) 458, 465 (1875), the United States Supreme Court stated that in an *in rem* proceeding:

> "We hold the rule to be that a valid seizure and actual control of the *res* by the marshal gives jurisdiction of the subject-matter, and that an accidental or fraudulent or improper removal of it from his custody, or a delivery to the party upon security, does not destroy jurisdiction."

The facts of *The Rio Grande* are strikingly similar to this case. There the district court had ordered release of the vessel *after* the libellants had appealed the dismissal of their *in rem* complaints for material liens, and had posted bonds which stayed the proceedings. This Court explained:

> "the order for restoration was in direct violation of the statute regarding appeals, and did not operate to destroy the jurisdiction of the Circuit Court. That court was authorized to proceed as if no such order had been made."

The Rio Grande, 90 U.S. at 465.

The holding of *The Rio Grande* has been applied in the Second, Fifth, Ninth and Eleventh Circuits. *U.S. v. The San Leonardo*, 51 F.Supp. 107, 111 (E.D.N.Y. 1942); *U.S. v. 3976.62 in Currency*, 37 F.R.D. 564, 566 (S.D.N.Y. 1965); *U.S. v. An Article of Drug—Neoterramycin*, 529 F.Supp. 230, 232 (N.D.Tx. 1981); *U.S. v. Ten Thousand Dollars in U.S. Currency*, 860 F.2d 1511, 1513-14 (9th Cir. 1988); *Tampa Tugs and Towing, Inc. v. M/V Sandanger*, 242 F.Supp. 576, 581 (S.D.Cal. 1965); *U.S. v. One 1983 Homemade Vessel Named Barracuda*, 858 F.2d 643, 647 (11th Cir. 1988). *See also Boone v. Wachovia Bank & Trust Co.*, 163 F.2d 809, 812 (D.C. Cir. 1947). The holding

of *The Rio Grande* has been cited as a viable principle of law in virtually every circuit, including the Seventh Circuit, although the facts of the respective cases did not call for its application. *See e.g. U.S. v. One 1979 Rolls-Royce Corniche Convertible*, 770 F.2d 713, 716-17 (7th Cir. 1985).

To preserve its right of appeal regarding the *res* in an *in rem* proceeding, the Ninth Circuit has admonished the appellant to (i) file a motion to stay the release of the *res*; or (ii) file a supersedeas bond; or (iii) file an *in personam* action against the owner. *Alyeska Pipeline Service Co. v. Vessel Bay Ridge*, 703 F.2d 381, 385 (9th Cir. 1983), *cert. dismissed*, 467 U.S. 1247 (1984).

In this case CSX took all the necessary and proper steps to preserve its right to appeal the bond issue by moving to stay the release of the vessel on June 16, 1988.[1] That Motion included an offer to set bond to protect Folkstone's interest. Nevertheless, the district court summarily denied the Motion to Stay. CSX immediately filed an Emergency Appeal to the Seventh Circuit to prevent the vessel's release until such time as the amount of the bond had been reviewed. The Seventh Circuit rejected that appeal on the same day, June 16, 1988. It then held that it could not review the amount of the bond set by the district court because the vessel was no longer in custody. The decision has put CSX in a classic "Catch 22" situation and it is fundamentally unfair in its application.

CSX should not be denied a review of the bond issues by virtue of the district court's and Seventh Circuit's failure to stay and failure to follow *The Rio Grande*. Moreover, the Seventh Circuit's holding will prevent any

[1] The fact that jurisdiction is preserved by Folkstone's *in personam* presence as a plaintiff and counter-defendant is discussed in Section II *infra*.

meaningful review of the conflict between the bondsetting provisions of Section 2464 and Rule E(5)(a) after trial.

The cases relied upon by the Seventh Circuit in dismissing the appeal are inapplicable. Neither *Thyssen Steel Corp. v. Federal Commerce & Navigation Co.*, 274 F.Supp. 18 (S.D.N.Y. 1967) nor *The Gasconier*, 8 F.2d 104 (E.D. N.Y. 1924) addressed the issue of continuing jurisdiction under *The Rio Grande* holding, or the effect of the owner's *in personam* jurisdiction. In *Thyssen* there never was an *in rem* proceeding because the ship was never arrested. In *Gasconier* the plaintiff was denied the right to re-arrest the ship in a refiled action, after his first case was dismissed at trial for want of prosecution.

Therefore, certiorari should be granted to reverse the Seventh Circuit's dismissal of the appeal which is in conflict with settled admiralty law and which prevents review of the conflict between the provisions of Section 2464 and Rule E(5)(a).

II.

THE SEVENTH CIRCUIT'S DECISION TO DISMISS THE APPEAL IS IN CONFLICT WITH THE DECISION OF THE UNITED STATES SUPREME COURT AND THE DECISIONS OF OTHER CIRCUITS WHICH HOLD THAT JURISDICTION IS NOT LOST WHERE THE OWNER OF THE *RES* IS PRESENT BEFORE THE COURT *IN PERSONAM*.

While it is ordinarily true that the removal of the *res* destroys the court's *in rem* jurisdiction, the United States Supreme Court has recognized an exception to this rule if the owner of the *res* is present before the court *in personam*. *Continental Grain Co. v. Barge FBL-585*, 364 U.S. 19 (1960). This Court there explained that the personification of a ship in an *in rem* proceeding has been attacked

as archaic, irrational, atavistic and an animistic survival from remote times. 364 U.S. at 23. Thus, the Court approved a motion to transfer pursuant to Section 1404(a) in an admiralty case to a district where the *in rem* action could never have been brought. One of the criteria for transfer under Section 1404(a) is the precondition that the action "could have been brought" in the district where it was going to be transferred. This transfer was allowed in *Continental Grain* because the owner was present before the court *in personam* and could have been sued in either forum. The fiction of the ship's personification was dispensed with to facilitate the administration of justice.

Applying this principle, the Fifth Circuit has held that where a party is present before the court in an *in personam* and *in rem* capacity, it is proper for the appellate court to exercise its jurisdiction *in personam* to correct any errors in the lower court's *in rem* adjudication even though the *res* has left the jurisdiction or been dispersed. *Inland Credit Corp. v. M/T Bow Egret*, 552 F.2d 1148, 1152 (5th Cir. 1977).

Similar holdings have been articulated by courts in the First, Second, Ninth and Tenth Circuits. *Trans-Asiatic Oil Ltd. v. Apex Oil Co.*, 804 F.2d 773, 777-79 (1st Cir. 1986); *Booth Steamship Co. v. Tug Dalzell No. 2*, 1966 A.M.C. 2615, 2616-19 (S.D.N.Y. 1966); *U.S. v. 66 Pieces of Jade*, 760 F.2d 970, 973 (9th Cir. 1985); *U.S. v. Wingfield*, 822 F.2d 1466, 1471-72 (10th Cir. 1987). The Second, Third and Ninth Circuits have also asserted jurisdiction over the owner of the *res* in an *in rem* proceeding under equitable maritime principles after the *res* was released for security or destroyed. *The Minnetonka*, 146 F. 509 (2d Cir. 1906); *The Fairisle*, 76 F.Supp. 27 (D.C.M. 1947); *Mosher v. Tate*, 182 F.2d 475 (9th Cir. 1950). Finally the Eighth and Eleventh Circuits have cited the holding

of *Inland Credit* favorably, but the facts of those cases did not give those circuits the opportunity to apply the holdings of *Inland Credit* and *Continental Grain. Bank of New Orleans v. Marine Credit Corp.*, 583 F.2d 1063, 1069 (8th Cir. 1978); *U.S. v. One Lear Jet Aircraft*, 836 F.2d 1571, 1575-77 (11th Cir. 1988).

The failure of the Seventh Circuit to follow *Continental Grain, supra* and consider the case of *Inland Credit Corp., supra*, puts it in conflict with the prior holding of the Supreme Court and the holdings of at least six other circuits which have dealt with similar issues.

It was Folkstone, not CSX, which instituted this action *in personam* at 10:18 a.m. the Monday morning following the 8:06 p.m. collision of the preceding Friday. It has submitted itself to the jurisdiction of the court.

> "The plaintiff having, by his voluntary act in demanding justice from the defendant, submitted himself to the jurisdiction of the court, there is nothing arbitrary or unreasonable in treating him as being there for all purposes for which justice to the defendant requires his presence."

Adam v. Saenger, 303 U.S. 59, 67-68 (1938).

The fact that Folkstone, the owner of the M/V Pontokratis, filed this suit some 60 hours after the accident demonstrates that it is a sophisticated litigant. It is common and accepted that, "everyone is presumed to know the law." This being the case, it must be presumed that Folkstone was familiar with the released bond provisions of 28 U.S.C. §2464. It follows that Folkstone had to be fully prepared to post a bond pursuant to that statute. To call upon it now to post that bond does not require that the vessel be returned to the jurisdiction of the Northern District of Illinois. It merely requires that

Folkstone do what it knew it might have to do when it invoked the jurisdiction of the court by filing suit against CSX. If Folkstone chooses not to comply with a valid court order to increase the bond, there are appropriate measures which can be taken. Among others, the trial court could strike its pleadings and set the matter down for proof of damages. Folkstone could be held in contempt, and it may be subject to other or further relief which the trial court might find appropriate.

Plenary consideration of this matter is essential to provide clarification of a federal court's jurisdiction and power to review and raise the bond. This Court should grant the Writ to achieve uniform application of admiralty law in bond setting matters.

III.

THE BOND SETTING PROVISIONS OF SECTION 2464 ARE IN CONFLICT WITH THE PROVISIONS OF RULE E(5)(a) REQUIRING STATUTORY CONSTRUCTION IN FAVOR OF SECTION 2464 WHICH PROTECTS A SUBSTANTIVE RIGHT.

The bond setting provisions of Section 2464 are in direct conflict with the provisions of Rule E(5)(a). Section 2464 requires a vessel owner who wishes to release his ship from *custodia legis* to post a bond in an amount equal to twice the amount of damages being claimed. Rule E(5)(a) provides that the bond shall be the lesser of (i) twice the plaintiff's claim or (ii) the value of the vessel. In this case CSX informed the district court that, for equitable reasons, it would agree to a bond in the amount of $15,000,000 rather than the full amount authorized by Section 2464 which would have been in excess of $24,000,000. Folkstone contended that the bond should reflect the post-collision value of the ship ($4,580,000) pursuant to Rule E(5)(a).

The issue of whether Section 2464 or Rule E(5)(a) should apply is one of first impression. This issue is not procedural; even the district court recognized that the issue was not the amount of the bond, but the statutory basis establishing the bond. Unfortunately, the district court erred in setting the release bond pursuant to Rule E(5)(a). Section 2464 should have priority over Rule E(5)(a) since the choice as between the statute or the rule will determine a substantive right as that term was utilized in *Hanna v. Plummer*, 380 U.S. 460, 466 (1964). The right to a particular type of bond, under these peculiar admiralty circumstances, is not an aspect of the judicial process used to enforce rights and duties. Procedure customarily concerns the manner and means by which a right to recover is enforced whereas a substantive right is one that, if limited, would significantly affect the outcome of the litigation. *Guaranty Trust Co. v. York*, 326 U.S. 99, 109 (1944). Here the amount of the bond effectively determines the existence of a remedy and thus involves a substantive right. Giving precedence to Section 2464 under these circumstances would be consistent with this Court's discussion of substantive rights in *Sibbach v. Wilson & Co.*, 312 U.S. 1 (1940). At page 13 of that opinion the Court noted that the right not to be injured and the right to seek redress for injury were such rights.

The amount of the bond represents a substantive right in this situation because it realistically determines whether or not the claimant will be able to exercise its right to recover its damages. Here the damages exceed the value of the ship. The ship was valued at $4,580,000 after deduction for the cost of repairs but defendants' unrebutted damages were in excess of $14,000,000. CSX will not be able to recover their damages unless Section 2464 is applicable since the only security for those damages is the

bond. The right to sue is meaningless if there is no remedy and the absence of sufficient security means that there will be no remedy. Where the damages far exceed the value of the vessel, the right to a complete damage bond under Section 2464 rises to the level of substantive protection.

Admiralty law has long recognized that the peculiar aspects of the shipping industry require special laws. Shipping involves international businesses which are frequently beyond the reach of most jurisdictions and the instrument of damage is extremely mobile. For example, a ship doing damage in one country may never return to that country and its owners in all likelihood will have no corporate presence in that country. A ship causing damage, in the absence of special provisions, would simply leave the jurisdiction and not return. Under those circumstances, the damaged person would be deprived of a remedy while the ship owner would continue to do business and profit from his ship. Our courts have expressed a desire to avoid that unfairness. See *Partenreederei Wallschiff v. The Pioneer*, 120 F.Supp. 525, 530 (E.D.Mich. 1954) (construing old Admiralty Rule 50 and Section 2464 to prevent a foreign ship from leaving the country).

To counter that predicament, admiralty law in the United States provides that a ship can be arrested and detained unless the ship owner posts a release bond. When a ship is arrested, the marshal can release the ship only upon the posting of a bond in twice the amount of the claimed damages. 28 U.S.C. sec. 2464. That statute obviously recognizes that the damage done might well exceed the value of the vessel, e.g. where the vessel is destroyed, and thus provides security commensurate with the damages rather than with the value of the vessel. That law also implicitly recognizes that the value of the

vessel lies largely in the ability to use the vessel for commercial purposes.

Where the damage exceeds the ship's value, the owner would be expected to avoid liability by simply leaving the ship behind, thus avoiding the intent of the statute, but for the owner's need to use the ship. By requiring a bond equal to twice the damages, the statute forces the ship's owner to make a choice. The owner can avoid liability by abandoning the ship but thus loses revenues from its operation, or he can post a sufficient bond and thus retain the right to use the vessel.

In this case, for example, the ship upon release was to pick up a cargo and carry it to Europe before being repaired. The high value to the owner of the right to currently use the ship is used as leverage to force the owner to post a sufficient bond. Absent that statute, it can be seen that the injured party would realistically be denied a right of recovery. The statute in question secures the injured party's substantive right to recover for injuries arising from maritime accidents.

A review of the policy considerations above shows that Section 2464 preserves a substantive right, and must be given priority over the bonding provision of Rule E(5)(a). Rule E was promulgated by the United States Supreme Court in 1966 pursuant to the Enabling Act. See *Transmittal*, 383 U.S. 1030, 1031, 39 F.R.D. 213, 244 (1966). Under the Enabling Act [28 U.S.C. sec. 2072], Congress delegated certain rule making powers to the Supreme Court. The Court reports procedural rules to the Congress, and such rules take effect unless Congress rejects them.

That rule making power is limited however to procedural rules and in a sense the rules so promulgated occupy

a lesser status. A rule enacted in that fashion has the force of a regulation and not a statute. See *In re Halkin*, 598 F.2d 176, 185, n. 17 (D.C. Cir. 1977), *citing Walko Corp. v. Burger Chef Systems, Inc.*, 554 F.2d 1165, 1168, n. 29 (D.C. Cir. 1977). That suggests that questions of statutory and rule conflict should recognize a priority on the part of the statute if that can be reasonably done. At least one district court has mentioned both Section 2464 and Rule E(5) together in passing without indicating that Rule E(5) has rendered Section 2464 obsolete. *Southern Oregon Prod. Credit Ass'n v. The Oil Screw Sweet Pea*, 435 F.Supp. 454, 458 (D.Or. 1977).

The priority of the statute must be recognized where the conflicting rule potentially affects a substantive right. The Enabling Act specifically provides that rules promulgated pursuant to its authority "shall not abridge, enlarge or modify any substantive right . . .". 28 U.S.C. sec. 2072. That principle was recently recognized in *Burlington Northern R.R. Co. v. Woods*, 480 U.S. 1, 4 (1987). Thus, although the Enabling Act provides that laws in conflict with rules enacted under that Act are of no force, the Act specifically limits that override to *procedural* rules.

For these reasons, it is imperative that this Court grant the Writ and hold that Section 2464 is viable and applicable when the damages caused by maritime accidents are greater than the value of the vessel. Statutory construction by this Court is necessary to provide guidance in all admiralty cases.

IV.

EQUITABLE PRINCIPLES IN ADMIRALTY LAW REQUIRE THE APPLICATION OF THE PROVISIONS OF SECTION 2464 OVER THE PROVISIONS OF RULE E(5)(a) WHEN THE DAMAGE CAUSED BY THE VESSEL EXCEEDS THE VALUE OF THE SHIP.

CSX further contends that the district court failed to exercise its equitable powers in this matter when construing the statute and the rule. Courts have traditionally exercised broad equitable power in maritime matters. Presumably this power arose historically in response to the unique issues presented by the nature of maritime misadventures and the consequent litigation. In this case, the district court felt constrained by Rule E(5).

The district court should instead have taken into consideration the unique characteristics of this case and set the release bond in an appropriate and realistic amount. The proven damages here exceed the amount of the bond set by the trial court by more than nine million dollars. The ship is under Cyprus registration and is owned by a Cyprus corporation. As such, the owners realistically will be immune from collection of the substantial portion of the damages which exceeds the amount of the bond. Unless the court exercises its equitable powers and sets a sufficient release bond, CSX will be prevented from obtaining compensation for its damages.

The damages have been established with sufficient certainty to allow the court to exercise its equitable powers. The ship struck a fixed land-based object. That fact alone strongly suggests the liability of the ship owners and supports the setting of a bond to fully secure CSX. Indeed, a presumption of fault attaches in such circumstances. *Petition of M/V Elaine Jones*, 480 F.2d 11, 17 (5th Cir. 1973); *Chicago and Western Indiana R.R. Co. v. Motorship Buko Maru*, 505 F.2d 579, 582-584 (7th Cir. 1974).

Where a statutory violation is alleged, as was plead in this case, the Pennsylvania rule shifts the burden of proof to the ship to show that the violations could not have caused the collision. *Hercules Carriers, Inc. v. Claimant State of Florida*, 768 F.2d 1558, 1568 (11th Cir. 1985).

Under these facts and under the statute, the district court would have been justified in setting the release bond at $15,000,000. In *Schiffahartsgesellschaft Leonhardt & Co. v. A. Bottacchi S.A. De Navegacion* 773 F.2d 1528, 1531 (11th Cir. 1985), the court was confronted with a question of whether another section of the Supplemental Admiralty Rules would allow an attachment. The ship owner posted bond to avoid arrest of the vessel by cargo owners and then sued the company chartering the ship for indemnity. After reversing the trial court's finding that the rule was unconstitutional [732 F.2d 1543], the court *en banc* noted that the district courts viewed their traditional maritime powers too narrowly. The court stated at 1531 that district courts should take a more expansive view of their power to fashion admiralty procedures. Those powers are independent of the rules.

The Supplemental Admiralty Rules were not intended to limit the traditional power of the courts to ensure that persons damaged in maritime accidents received justice. The Notes of the Advisory Committee on the Rules [see note to Rule A] specifically provided that the Rules were not to be construed as limiting the traditional power of the court in admiralty to adapt its procedures and remedies in each case so as to secure "just, speedy, and inexpensive determination . . ." of actions. *Schiffahartsgesellschaft*, 773 F.2d at 1533.

A right to sue without hope of recovering damages is not a just remedy or a just determination. Section 2464 or an equitable corollary should have been used to pre-

serve CSX's rights. The ship owners have sought the protection of the courts in this country and sued CSX which has assets here allowing the ship owners to recover their damages if they prevail. Equity requires that the defendants be placed in that same position with respect to their claim against this foreign corporation. The ship owners should not be able to post clearly insufficient bond and "sail away and earn large profits". See *K/S Ditler Chartering A/S & Co. v. Egeria S.p.A. di Navigazione*, 1982 A.M.C. 1817, 1822 (E.D.Va. 1982).

Plenary consideration by this Court is necessary to reassert the broad equitable powers of federal courts in admiralty matters in light of the limiting language of the Supplemental Admiralty Rules.

V.

THE LANGUAGE OF RULE E(5)(a) WHICH PROVIDES THAT THE BOND EQUAL "THE VALUE OF THE PROPERTY ON DUE APPRAISEMENT" REQUIRES CLARIFICATION ON WHETHER THE VALUE IS OF THE UNDAMAGED VESSEL IN ITS CONDITION BEFORE THE COLLISION.

The district court set the amount of the bond at $4,580,000 rather than the amount of $9,000,000 as requested in the alternative by CSX. The court's determination represents the value of the vessel at the time of the collision less the costs of repair and towing. If this Court determines that Rule E(5)(a) and not Section 2464 governs this question, CSX alternatively contends that the release bond should have been set in the amount of $9,000,000. That amount represents the sound value of the undamaged ship prior to the collision, without deduction for repair costs.

Rule E(5)(a) provides that the amount of the bond shall not exceed the "value of the property on due appraisement". The rule is silent as to the date to be used in

determining the value of the ship. The unanswered question is whether the value recited in the rule is the value of the ship in its undamaged condition before Folkstone ran into the bridge, or the value of the ship in its damaged condition after the collision. Neither the parties nor the district court were able to locate a case on point with respect to this issue and it appears to be one of first impression. Clarification of the construction of this Rule is required to provide certainty in admiralty cases. Equity and logic require that the bond be set in an amount based on the sound value of the ship in its undamaged condition before the collision. Any other result destroys the right of the injured party to have security for his damages.

The parties apparently agree that the sound value of the vessel is best calculated by current market conditions. The value of the loss is the ship's market value. *Barton v. Borit*, 316 F.2d 550, 552 (3rd Cir. 1963). The use of current ship sale figures resulted in Ottaway's opinion that the ship had a value of $9,000,000. Folkstone's witnesses set the sound value at approximately $8,000,000. One or the other of those figures should have been utilized as the amount of the bond.

The district court set the amount of the bond on the premise that the purpose of the bond was to substitute the bond for the value of the vessel. Appendix p. 16a. The district court therefore reasoned that the value to be used in setting the bond was the value of the ship in its damaged condition, i.e., its value at the time of the exchange. That premise is not correct and the cases cited in the Amended Memorandum Opinion (appendix pp. 16a-17a) do not stand for that proposition.

The purpose of the bond is to secure for the injured party the right to recover his damages and, at the same time, to allow the shipowner to obtain the return and use

of his vessel during the pendency of the litigation. However, when the ship is surrendered by the marshal after a release bond is posted, the injured party is losing more than the security provided by the resale or market value of the arrested ship. CSX is also losing the economic leverage which it had previously by virtue of its ability to prevent the tortfeasor from use of the vessel during the litigation and possibly after the litigation if the debt remained unpaid. The right to use the vessel has value, and the preliminary evidence in this case suggests that this right is of substantial value. The owner in this case intended to take advantage of that earning power immediately upon release as the ship was to pick up a cargo before sailing for repairs.

Thus a bond set only for the value of the ship in its damaged condition only compensates the injured party for that value. The injured party loses the value of the security represented by his ability to prevent the owner from using the ship. That suggests that the amount of the bond should be set, at a minimum, to reflect the fair market value of the ship immediately before the collision. That value takes into consideration the real worth of the vessel to its owner. Even that value is far below the real value of the ship because the evidence is that the replacement value of the ship was $14,000,000.

The equitable power of a district court in a maritime proceeding, as described in *Schiffahartsgesellschaft Leonardt & Co. v. A. Bottacchi S.A. De Navegacion*, 773 F.2d 1528, 1531 (11th Cir. 1985), allows the court to take the above facts into consideration. In fact, as long ago as 1927, this Court mandated that equity control the proceedings.

> It is quite evident from these cases that this court has by its rules and decisions given the statute a very broad and equitable construction for the pur-

> pose of carrying out its purpose and for facilitating a settlement of the whole controversy over such losses as are comprehended within it, and that all the ease with which rights can be adjusted in equity is intended to be given to the proceeding. It is the administration of equity in an admiralty court.

Hartford Accident & Indemnity Co. v. Southern Pacific Co., 273 U.S. 207, 215-16 (1927). It is quite evident from these cases that this Court has by its rules and decisions given the [limitation] statute a very broad and equitable construction.

The continued existence of Section 2464 carries the same implication. Under that statute, bond was to be set in a relatively large amount because Congress recognized that a bond set only in the amount of the current dockside value of the ship was unfair to the injured party and did not represent the true value of the ship to the owner. The same "true value" reasoning was used in *K/S Ditler Chartering A/S & Co. v. Egeria S.p.A. di Navigazione*, 1982 A.M.C. 1817, 1821 (E.D.Va. 1982). The court there held that the mortgage on the ship could not be considered when determining the value of the ship to the owner. By way of comparison, one might infer here that the real value of the ship is the amount for which it is insured, i.e., $10,000,000. Section 2464 thus recognizes that the damages might well exceed the ship's value, and protection for those damages must be incorporated into the bond provisions of Rule E.

In this case, the damage to CSX is clear and the liability of the shipowner seems self-evident. Therefore the district court should have exercised its equitable powers and set the bond in an amount that reflected the market value of the ship in its undamaged condition before the collision.

Once again, the Writ should be granted to provide guidance as to the statutory construction of the language of Rule E(5)(a).

CONCLUSION

For the reasons stated above, this Petition for a Writ of Certiorari should be granted and this Court should (i) reverse the Seventh Circuit's dismissal of the appeal, (ii) reverse the district court's decision and instead hold that Section 2464 should be given priority over Rule E(5)(a), and (iii) remand to the district court with instructions to enter a bond in the amount of $15,000,000. Alternatively, this Petition for a Writ of Certiorari should be granted and the Court should vacate the Seventh Circuit's dismissal of the appeal and remand the case to the Seventh Circuit for a decision on the merits regarding the conflict between Section 2464 and Rule E(5)(a).

Respectfully submitted,

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APPENDIX

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Nos. 88-2064 and 88-2137

FOLKSTONE MARITIME, LTD., a Cyprus Corporation,

Plaintiff and Counterdefendant-Appellee,

v.

CSX CORPORATION, a corporation, and CSX TRANSPORTATION, INC., a corporation,

Defendants and Counterplaintiffs-Appellants,

v.

THE M/V PONTOKRATIS, a vessel,

Counterdefendant-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 88 C 4040—**Ilana D. Rovner**, Judge.

ARGUED DECEMBER 5, 1988—DECIDED JANUARY 26, 1989

Before BAUER, *Chief Judge*, EASTERBROOK, *Circuit Judge*, and GRANT, *Senior District Judge.**

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* The Honorable Robert A. Grant, Senior Judge of the United States District Court for the Northern District of Indiana, is sitting by designation.

BAUER, *Chief Judge.* On May 6, 1988, the M/V *Pontokratis* was passing through the navigable channel of the Calumet River in Chicago when it ran into a railroad bridge. On May 9, Folkstone Maritime, Ltd. ("Folkstone"), a Cyprus corporation and the owner of the *Pontokratis*, a vessel under Cyprus registration, sued CSX Corporation and CSX Transportation, Inc. ("the Railroad"), the bridge's owners, alleging negligence in its operation. On May 11, the Railroad answered and asserted a counterclaim against Folkstone, alleging negligence in navigation. The Railroad also counterclaimed *in rem* against the *Pontokratis* and had the vessel arrested. The *in rem* action is the subject of this appeal.

Soon after the filing of the counterclaims, Folkstone sought a hearing in the district court to determine the amount of security required to release the *Pontokratis* from arrest. Folkstone requested the hearing pursuant to Rule E(5)(a) of the Supplemental Rules for Certain Admiralty and Maritime Claims, which limits the amount of security necessary to release a vessel in these circumstances to the lesser of twice the amount of the plaintiff's claim or the duly appraised value of the ship. The Railroad, on the other hand, asked the district court to set the amount of the release bond pursuant to 28 U.S.C. § 2464, which provides for security of twice the amount of plaintiff's claim. As the parties' positions suggest, it was clear that the Railroad's claimed damages of over $12 million far exceeded the value of even the pre-collision *Pontokratis*.

After conducting a hearing on the question of the *Pontokratis*'s value, the district court on May 27, 1988 held that Supplemental Rule E(5)(a) superseded 28 U.S.C. § 2464 and controlled the determination of the amount of the release bond. The court also held that the determination of the *Pontokratis*'s value for purposes of Supplemental Rule E(5)(a) should be based on the ship's damaged condition on the date of its arrest, not on its pre-collision condition. Pursuant to these conclusions, the district court set the principal sum of the release bond at $4.58 million.

On June 2, the court denied the Railroad's motion for reconsideration or, in the alternative, for certification under 28 U.S.C. § 1292(b). On June 3, 1988, the Railroad filed the first of these consolidated appeals.

On June 6, Folkstone filed its release bond and requested the clerk to issue a Writ of Restitution ordering the Marshal to release the *Pontokratis*. The clerk refused, so on June 9, Folkstone asked the district court for an order directing the clerk to issue the Writ of Restitution. The court denied Folkstone's motion, holding that it no longer had jurisdiction over the dispute because of the Railroad's appeal filed on June 3. We reversed that ruling on June 15, however, and on June 16 the district court issued the Writ of Restitution and denied the Railroad's motion to stay the *Pontokratis*'s release pending appeal, prompting the latter to file the second of these consolidated appeals. That same day, the *Pontokratis* was released from *custodia legis* and is no longer within the district court's territorial jurisdiction.

That the *Pontokratis* is now far away is a problem, although not one discussed in the parties' briefs. They instead battle at length over the issues of whether the district court erred in setting the release bond pursuant to Supplemental Rule E(5)(a) rather than 28 U.S.C. § 2464 or, in the alternative, whether the court should have set the bond in an amount equal to the value of the *Pontokratis* as it existed immediately before it met the bridge, not after. The significant question now, however, is whether resolution of these issues would mean anything in light of the vessel's departure. If not, the issues are moot and we lack subject matter jurisdiction over the appeal. *DeFunis v. Odegaard*, 416 U.S. 312, 316 (1974) (noting the "familiar proposition that 'federal courts are without power to decide questions that cannot affect the rights of the litigants in the case before them' " (quoting *North Carolina v. Rice*, 404 U.S. 244, 246 (1971))); *In re Hilligoss*, 849 F.2d 280, 282 (7th Cir. 1988) (noting our obligation to consider jurisdictional issues regardless of whether they are raised by the parties).

The Railroad wants from us a determination, in one form or another, that the district court should have set the *Pontokratis*'s release bond at a higher amount. But what are the chances of such a determination having an effect on this litigation? When the district court set the amount of the release bond in the first instance, Folkstone had two options: it could have foregone paying the release bond and left the *Pontokratis* behind to satisfy any judgment obtained by the Railroad, or it could have paid the bond and secured the release of the vessel. Folkstone obviously chose the latter course because the *Pontokratis* was worth more to it, even in its damaged condition, than the amount of the release bond. That choice illustrates a point emphasized by the Railroad—that an arrested vessel may be worth more to its owner than its "duly appraised" resale or market value, perhaps substantially more, because the owner may place a high value on the loss of the use of the vessel. As the Railroad points out, this means that the owner of an arrested vessel can be forced to pay an amount higher than the vessel's appraised market or resale value in order to secure its release. According to the Railroad, it should therefore be entitled to use this excess value as "economic leverage" over the vessel's owner, and 28 U.S.C. § 2464 should govern the determination of the amount of the release bond because Supplemental Rule E(5)(a) precludes such economic leveraging by limiting the amount of the release bond to the vessel's appraised value.

We need not consider this argument, because the vessel is gone and neither we nor the district court have the power to bring it back. *See Thyssen Steel Corp. v. Federal Commerce & Navigation Co., Ltd.*, 274 F. Supp. 18, 20-21 (S.D.N.Y. 1967) ("existing authority is to the effect that the court cannot order a shipowner to harbor his ship, which is in international waters, in order that it might provide security for a plaintiff's unproven claim") (citing Supplemental Rule E(3)(a), which provides that "[p]rocess in rem and of maritime attachment and garnishment shall be served only within the district," and the advisory notes

thereto); *see also The Gasconer*, 8 F.2d 104, 105 (E.D.N.Y. 1924) ("a vessel discharged from arrest upon admiralty process by the giving of a bond . . . returns to her owner freed forever from the lien upon which she was arrested, and can never be seized again"). So even if we were to grant the Railroad's request for a determination that it is entitled to more security, what could happen? Folkstone might send the Railroad a check for the additional amount, but that seems highly unlikely. Folkstone might sail the *Pontokratis* back to Chicago and hand it over to the Railroad, giving the latter roughly what it might have received had the release bond been set at a higher amount in the first instance, but that, too, seems doubtful. Most likely, Folkstone would do absolutely nothing, which would render any review of the district court's determination of the amount of the release bond an "empty rite," *see Swift & Co. Packers v. Compania Colombiana Del Caribe*, 339 U.S. 684, 689 (1950), and therefore moot.

The Railroad has done little to convince us otherwise. At oral argument, it claimed that the *Pontokratis* might someday sail back within the district court's territorial jurisdiction, but "might someday" is not a strong enough foundation upon which to base subject matter jurisdiction. The Railroad also argued that a ruling in its favor in this case could possibly generate the dismissal of Folkstone's *in personam* action against the Railroad that still is pending in the district court. But even aside from the fact that Folkstone's *in personam* action against the Railroad and the Railroad's *in rem* action against the *Pontokratis* are quite distinct, this argument is unconvincing, for the dismissal of Folkstone's *in personam* action would not translate into any additional security for the Railroad in this action, nor would it bring the *Pontokratis* back. Any review of the Railroad's claims, then, would still be an empty rite for purposes of this litigation.

In sum, the district court's determination of the amount of the *Pontokratis*'s release bond is water under the bridge, and the railroad's appeal is therefore

DISMISSED.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

March 9, 1989.

Before

Hon. WILLIAM J. BAUER, *Chief Judge*
Hon. FRANK H. EASTERBROOK, *Circuit Judge*
Hon. ROBERT A. GRANT, *Senior District Judge**

No. 88-2064, 88-2137

FOLKSTONE MARITIME, LTD.,

Plaintiff and Counterdefendant-Appellee,

vs.

CSX CORPORATION and CSX TRANSPORTATION INC.,

Defendants and Counterplaintiffs-Appellants,

vs.

THE M/V PONTOKRATIS,

Counterdefendant-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division
No. 88 C 4040—**Ilana D. Rovner**, *Judge.*

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* The Honorable Robert A. Grant, Senior Judge of the United States District Court for the Northern District of Indiana, is sitting by designation.

ORDER

On consideration of the petition for rehearing filed by defendants and counterplaintiffs-appellants, all of the judges of the original panel have voted to deny the petition for rehearing.

IT IS HEREBY ORDERED that the aforesaid petition for rehearing be and the same is hereby DENIED.

UNITED STATES DISTRICT COURT,
NORTHERN DISTRICT OF ILLINOIS,
EASTERN DIVISION

Case Number: 88 C 4040 Date: May 27, 1988

Name Of Assigned Judge: ILANA DIAMOND ROVNER

Case Title: FOLKSTONE MARITIME, LTD. v.
CSX CORP., et al. v.
THE M/V PONTOKRATIS

* * * * *

DOCKET ENTRY:

(1) ☐ Judgment is entered as follows:

(2) ☒ [Other docket entry:]

The amount of the bond required to be posted by Folkstone, pursuant to Supplemental Rule E(5)(a), to release the M/V Pontokratis from custody is $4,580,000. As required by Rule E(5)(a), the bond "shall be conditioned for the payment of the principal sum and interest thereon at 6 per cent per annum." The posting of a special bond in this amount acts as security only as to the claims of CSX corporation and CSX Transportation. For further details see Memorandum Opinion and Order attached to original minute order.

/s/ ILANA DIAMOND ROVNER

* * * * *

(12) ☒ (For further detail see
☒ order attached to the original minute order form.)

UNITED STATES DISTRICT COURT,
NORTHERN DISTRICT OF ILLINOIS,
EASTERN DIVISION

Case Number: 88 C 4040 Date: June 2, 1988

Name Of Assigned Judge: ILANA DIAMOND ROVNER

Case Title: FOLKSTONE MARITIME, LTD. v.
CSX CORP., et al. v.
THE M/V PONTOKRATIS

* * * * *

DOCKET ENTRY:

(1) ☐ Judgment is entered as follows:

(2) ☒ [Other docket entry:]

For the reasons explained in open court at the June 2, 1988, hearing, CXS's motions for reconsideration and for certification under 28 U.S.C. Section 1292(b) are hereby denied. The Court's May 27, 1988, Memorandum Opinion and Order is amended. For further information see reverse side of this original minute order and amended Memorandum Opinion and Order, dated June 2, 1988, attached to original minute order.

/s/ ILANA DIAMOND ROVNER

* * * * *

(12) ☒ (For further detail see
☒ order attached to the original minute order form.)

(Reserved for use by the Court)

ORDER

For the reasons explained in open court at the June 2, 1988, hearing, CSX's motions for reconsideration and for certification under 28 U.S.C. Section 1292(b) are hereby denied. The Court's May 27, 1988, Memorandum Opinion and Order is amended as follows:

1. On page 2, footnote 2:

   a. After "to file" add: by 5:00 p.m. on May 25, 1988.

   b. After "May 20, 1988" add: *See* transcript of May 20, 1988, Hearing at 92.

2. On page 3, line 4: delete "occurance" and insert "occurrence".

3. On page 9, footnote 4: After "¶ E." delete "B" and insert "13".

For further information see amended Memorandum Opinion and Order, dated June 2, 1988, attached to original minute order.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

FOLKSTONE MARITIME, LTD., a Cyprus Corporation,
Plaintiff and Counterdefendant,

v.

CSX CORPORATION, a corporation and CSX TRANSPORTATION, INC., a corporation,
Defendants and Counterplaintiffs,

v.

THE M/V PONTOKRATIS, a vessel,
Counterdefendant.

No. 88 C 4040
HONORABLE ILANA DIAMOND ROVNER

AMENDED MEMORANDUM OPINION AND ORDER

I. INTRODUCTION

Pending before the Court is the application of Folkstone Maritime, Ltd., the owner and claimant of the M/V Pontokratis, for its release from *custodia legis* pursuant to Rule E of the Supplemental Rules for Certain Admiralty and Maritime Claims, Federal Rules of Civil Procedure.[1] The Court has jurisdiction over this matter under 28 U.S.C. Section 1333 (1).

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[1] The Supplemental Rules for Certain Admiralty and Maritime Claims apply to the procedure in admiralty actions within the meaning of Fed.R.Civ.P. 9(h). Supplemental Rule A.

On May 6, 1988, the M/V Pontokratis, a Cypriot registered vessel of 29,000 deadweight tons, was underway and bound upstream on the Calumet River heading toward Lake Michigan. A collision occurred between the M/V Pontokratis and the B&O Bridge. The bridge is situated over the Calumet River, and is located south of 95th Street in Chicago, Illinois. As a result of this collision, the B&O Bridge was destroyed and there was substantial damage to the vessel.

On May 9, 1988, Folkstone Maritime filed this lawsuit against CSX Corporation, and its subsidiary, CSX Rail Transportation, Inc. (hereinafter jointly referred to as "CSX"), the owner of the railroad bridge. On May 11, 1988, CSX filed a counterclaim against the M/V Pontokratis, *in rem*, and caused the vessel to be arrested. The vessel has remained in *custodia legis* since that time.

On May 19 and May 20, 1988, the Court heard oral argument on whether 28 U.S.C. §2464 or Fed.R.Civ.P. Supplemental Rule E(5)(a) governs the procedure for releasing the vessel on bond. Pursuant to the Court's order, on May 25, 1988, counsel also filed legal memoranda on this issue.[2]

At the May 20, 1988, hearing the Court heard the testimony of Demetri Antippas, a naval architect and maritime consultant experienced in the appraisal of vessels (by deposition), and Leonidas Moustakis, the managing director of Ocean Freighters, Ltd., Piraeus, Greece, the managers of the vessel, as to the value of the vessel. Transcript of May 20, 1988, Hearing ("Transcript") at 6-49. Harry J. Ottaway of New York, an experienced vessel appraiser, testified on behalf of the defendant as to the market value of the vessel before the occurrence. Transcript at 80-91. David A. Novick, a bridge construction

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[2] Counsel for CSX, however, failed to file by 5:00 p.m. on May 25, 1988, proposed findings and calculations as ordered in both open court and the Court's minute order dated May 20, 1988. *See* transcript of May 20, 1988, Hearing at 92.

engineer, testified that the B&O Bridge would cost approximately $12,100,000 to replace. Transcript at 57. Stephen K. Ramsey, CSX engineer of bridges and buildings testified that the cost of demolishing the current bridge, cleaning up the site, and clearing the channel will approximate $1,060,000. Transcript at 74.

II DISCUSSION

The initial question for the Court to determine is whether Fed.R.Civ.P. Supplemental Rule E (5)(a) or 28 U.S.C. §2464 governs the procedure for releasing the vessel on bond.[3] These rules, which state procedures for setting a

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[3] Rule E(5)(a) of the Supplemental Rules for Certain Admiralty and Maritime Claims provides as follows:

> Except in cases of seizures for forfeiture under any law of the United States, whenever process of maritime attachment and garnishment or process in rem is issued the execution of such process shall be stayed, or the property released, on the giving of security, to be provided by the court or clerk, or by stipulation of the parties, conditioned to answer the judgment of the court or of any appellate court. The parties may stipulate the amount and nature of such security. In the event of the inability or refusal of the parties so to stipulate the court shall fix the principal sum of the bond or stipulation at an amount sufficient to cover the amount of the plaintiff's claim fairly stated with accrued interest and costs; but the principal sum shall in no event exceed (i) twice the amount of the plaintiff's claim or (ii) the value of the property on due appraisement, whichever is smaller. The bond or stipulation shall be conditioned for the payment of the principal sum and interest thereon at 6 per cent per annum.

28 U.S.C. §2464(a) provides as follows:

> Except in cases of seizures for forfeiture under any law of the United States, whenever a warrant of arrest or other process in rem is issued in any admiralty case, the United States marshal shall stay the execution of such process, or discharge the property arrested if the process has been levied, on receiving from the respondent or claimant of the property a bond or stipulation in double the amount claimed by the libellant, with

(Footnote continued on following page)

bond, are facially inconsistent. Under Section 2464 the bond must be posted at double the amount of the claim against the vessel. Under Rule E (5)(a) the bond is the *lesser* of twice the plaintiff's claim or the value of the property. The Court has carefully reviewed all of the authorities submitted by counsel and is pursuaded that Supplemental Rule E (5)(a) is valid, that it supercedes §2464, and that it must be applied in the present case. *Cf. Burlington Northern Railroad v. Woods*, ____ U.S. ____, 107 S.Ct. 967, 970 (1987); *Winsor v. Daumit*, 179 F.2d 475 (7th Cir. 1950), 28 U.S.C. Section 2072 (the Rules Enabling Act); 7A J. Moore & A. Paleaz, *Moore's Federal Practice*, ¶.02[3] at 22-25 and 23 n.3 (1988) ("While much of the substance of [section 2464] is retained in the Supplemental Rule, the amount of the bond required to release property has been substantially changed and, therefore, the inconsistent provisions of the statute are superceded."); 4 C. Wright & A. Miller, *Federal Practice and Procedure* Section 1030 (1973), G. Gilmore & C. Black, *The Law of Admiralty* (2d ed. 1975) at 797.

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[3] *continued*

sufficient surety, to be approved by the judge of the district court where the case is pending, or, in his absence, by the collector of the port, conditioned to answer the decree of the court in such case. Such bond or stipulation shall be returned to the court, and judgment or decree thereon, against both the principal and sureties, may be secured at the time of rendering the decree in the original case. The owner of any vessel may deliver to the marshal a bond or stipulation, with sufficient surety, to be approved by the judge of the district court, conditioned to answer the decree of such court in all or any cases that are brought thereafter in such court against the vessel. Thereupon the execution of all such process against such vessel shall be stayed so long as the amount secured by such bond or stipulation is at least double the aggregate amount claimed by libellants in such suits which are begun and pending against such vessel. Similar judgments or decrees and remedies may be had on such bond or stipulation as if a special bond or stipulation had been filed in each of such suits.

Professors Wright and Miller describe the procedure for setting the bond as follows:

> In actions in rem and in actions in which maritime attachment and garnishment have been used, Supplemental Rule 5(E) provides three methods for the release of property arrested. A party may secure release by giving a special bond. This procedure is similar to that *formerly* provided by [28 U.S.C. Section 2464], but there has been a significant change in the amount of the bond required. The statute [28 U.S.C. Section 2464] called for security in double the amount claimed by the plaintiff. Rule E(5)(a) permits the parties to stipulate the amount and nature of security, and authorizes the court to fix the principal sum of the bond if the parties are unable to agree. The Court is to fix bond in an amount sufficient to cover the amount of the plaintiff's claim fairly stated with accrued interest and costs, *but in no event is the sum fixed to exceed the lesser of the value of the property on due appraisement or twice the amount of the plaintiff's claim.*

12 C. Wright & A. Miller, *Federal Practice and Procedure* §3244 at 289 (1973) (emphasis added).

The relevant testimony presented for purposes of determining the amount of the bond under Rule E(5)(a) is that the amount of the claim of CSX exceeds $12,000,000. That amount is doubled under subsection (i). The testimony concerning the value of the vessel was that it is worth well below $24,000,000. Therefore, the Court must fix the principal sum of bond pursuant to Rule E(5)(a)(ii) at the value of the vessel.

Releasing the M/V Pontokratis on bond under Rule E (5)(a) results in the transfer of the maritime lien from the vessel to the fund represented by the security. *C.f. Overstreet v. Water Vessel Norkong*, 706 F.2d 641, 644-45 (5th Cir. 1983); *United States v. Ohio Valley Company, Inc.*, 510 F.2d 1184, 1190 n. 13 (7th Cir. 1975). The purpose of the bond is to substitute for the actual vessel. This sub-

stitution makes it possible for the owner of the vessel to begin repairs. The bond also protects CSX against depreciation of a damaged, unrepaired vessel.

Thus, the lien should be in an amount equal to the fair market value of the M/V Pontokratis as she presently exists in the custody of the Court. The valuation must be made based on the damaged condition of the M/V Pontokratis. Security set at a pre-casualty value would give the lienholder a substitute *res* larger than that contemplated when the arrest warrant was issued. The fair market value of a vessel is established through comparison with "contemporaneous sales of like property," *Standard Oil of New Jersey v. Southern Pacific Co.*, 268 U.S. 146, 155 (1925), making adjustments to reflect the age and condition of the vessel. *C.f. Petition of Buckeye S.S. Co.*, 93 F.Supp. 818, 820-21 (N.D. Ohio 1950).

After hearing all of the testimony and reviewing the transcripts, the Court finds that there is an existing market for bulk freighters of the size and the type of the M/V Pontokratis from which a valuation for security purposes can be made. Further, the Court agrees with Mr. Antippas and Mr. Moustakis concerning the value of the vessel. Mr. Antippas testified that the amortized book value of the M/V Pontokratis immediately prior to the May 6th occurance was $6,542,655. This market value was enhanced, due to an active freight market, by 22% to a market value of $7,982,039. Transcript at 33; Plaintiff's Exhibit 1. The testimony is supported by the testimony of Mr. Moustakas who stated that the pre-accident market value of the vessel was $8,000,000. Transcript at 12. Mr. Ottaway, using sales of comparable vessels, opined that the value of the vessel prior to the May 6, 1988, occurrence was $9,000,000. Transcript at 85. His opinion, however, failed to make a full adjustment for the decline in the freight market between February and May of 1988. Transcript at 17. Therefore, the Court finds that the fair market value of the M/V Pontokratis on May 6, 1988, prior to the collision, was $8,000,000.

Today, as at the time of the vessel's arrest on May 13, 1988, the M/V Pontokratis is substantially damaged and is not marketable as a trading vessel. Efforts are currently underway to return the vessel to trading at the least possible loss taking into account the cost of repairs, the cost of towage to a shipyard, and the time to be lost during the course of repairs. Transcript at 16. The Court heard testimony concerning these costs from Mr. Antippas and Mr. Moustakis. CSX presented no evidence on this issue. Estimates of the cost of repairs varied from shipyard to shipyard between $3,000,000 and $3,500,000. The cost of towage varied, depending upon the distance of the shipyard from the vessel, from $250,000 to $461,000. Temporary repairs to make the vessel "towworthy" were estimated at a minimum of $20,000. Transcript at 19-21. While in a shipyard for repair, additional expenses including surveys, crew, security, agency, and other miscellaneous items (not included in the shipyard repair cost) were estimated at between $150,000 and $350,000. Transcript at 23, 38. Altogether, the court finds that the minimum cost of temporary repairs, repairs, towage, and ancillary expenses is $3,420,000. Thus, the Court further finds that the fair market value of the M/V Pontokratis on the day of her arrest was $8,000,000, less $3,420,000, for a total of $4,580,000.

III CONCLUSION

For the reasons set forth above, the amount of the bond required to be posted by Folkstone, pursuant to Supplemental Rule E(5)(a), to release the M/V Pontokratis from custody is $4,580,000. As required by Rule E(5)(a), the bond "shall be conditioned for the payment of the principal sum and interest thereon at 6 per cent per annum." The posting of a special bond in this amount acts as security only as to the claims of CSX corporation and CSX Transportation.[4]

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[4] *See* 7A J. Moore & A. Paleaz, *Moore's Federal Practice* ¶ E.13 [2] at 620 (1988).

ENTER:

/s/ ILANA DIAMOND ROVNER
Ilana Diamond Rovner
United States District Judge

DATE: June 2, 1988

UNITED STATES DISTRICT COURT,
NORTHERN DISTRICT OF ILLINOIS,
EASTERN DIVISION

Case Number: 88 C 4040 Date: June 16, 1988

Name Of Assigned Judge: ILANA DIAMOND ROVNER

Case Title: FOLKSTONE MARITIME, LTD. v. CSX CORP.

* * * * *

DOCKET ENTRY:

(1) ☐ Judgment is entered as follows:

(2) ☒ [Other docket entry:]

Folkstone's motion for issuance of a writ of restitution and filing of cost bond under Local Admiralty Rule 13 is granted. The Clerk of Court shall issue the writ of restitution pursuant to Supplemental Rule E(5)(a). CSX's motion to stay enforcement of order releasing vessel pending appeal and to set bond is denied. CSX shall pay any outstanding United States Marshal fees today.

/s/ ILANA DIAMOND ROVNER

* * * * *

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

June 16, 1988.

Before

Hon. RICHARD D. CUDAHY, *Circuit Judge*
Hon. FRANK H. EASTERBROOK, *Circuit Judge*
Hon. KENNETH F. RIPPLE, *Circuit Judge*

No. 88-2064

FOLKSTONE MARITIME, LTD., a Cyprus Corporation,

Plaintiff-Counter/Defendant-Appellee,

vs.

CSX CORPORATION, a corporation and CSX TRANSPORTATION INC., a corporation,

Defendants-Counter/Plaintiffs-Appellants,

vs.

THE M/V PONTOKRATIS, a Vessel,

Counter/Defendant.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division
No. 88 C 4040—**Ilana D. Rovner,** *Judge.*

This matter comes before the court for its consideration upon the following document:

"EMERGENCY MOTION TO STAY ORDER RELEASING VESSEL", filed herein on June 16, 1988, by counsel for the CSX CORPORATION, a corporation and

CSX TRANSPORTATION, INC., Defendants-Counter/Plaintiffs-Appellants.

The factors regulating the issuance of a stay are: 1. whether the stay applicant has made a strong showing of likelihood of success on the merits; 2. whether the applicant will suffer irreparable harm in the absence of a stay; 3. whether a stay will substantially harm other parties to the proceedings, and 4. where the public interest lies. *Glick v. Koenig*, 766 F 2d 265 (7th Cir. 1985). Upon careful review of the motion submitted by the appellant in this case, the court finds that the appellant has not met the criteria necessary to justify a stay of the district court's order. Accordingly,

IT IS ORDERED that the "EMERGENCY MOTION TO STAY ORDER RELEASING VESSEL" filed by the appellants is DENIED.

Supreme Court, U.S.
FILED
JUN 23 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1909

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

CSX CORPORATION and
CSX TRANSPORTATION, INC.,

Petitioners,

v.

FOLKSTONE MARITIME, LTD.
and M/V PONTOKRATIS,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

MICHAEL A. SNYDER *
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June 1989

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QUESTION PRESENTED

Whether an appeal of a District Court order setting the amount of bond (F.R.Civ.P. Supplemental Rule E(5)(a)) required to release an arrested vessel is rendered moot when the required bond is posted and the vessel leaves the jurisdiction?

LIST OF PARTIES AND RULE 28.1 LIST

The parties to the proceeding below and before this Court are the petitioners, CSX Corporation and CSX Transportation, Inc., and the respondents, Folkstone Maritime, Ltd., *in personam*, and the M/V Pontokratis, as it is proceeded against *in rem*.

Folkstone Maritime, Limited is a corporation organized under the laws of the Republic of Cyprus. It has no parent corporations, subsidiaries, or affiliates.

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No. 88-1909

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

CSX CORPORATION and
CSX TRANSPORTATION, INC.,

Petitioners,

v.

FOLKSTONE MARITIME, LTD.
and M/V PONTOKRATIS,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

The respondents, Folkstone Maritime, Ltd. and M/V Pontokratis respectfully oppose the granting of a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit, entered in the above styled proceeding on January 26, 1989 and March 9, 1989.

OPINIONS BELOW

The Amended Memorandum Opinion and Order of the United States District Court for the Northern District of Illinois, Eastern Division (Rovner, D.J.) is reported at 1989 A.M.C. 862. The opinion and order of the United States Court of Appeals for the Seventh Circuit dismissing petitioner's appeal is reported at 866 F.2d 955, 1989 A.M.C. 867. The March 9, 1989 Order of the Court of Appeals for the Seventh Circuit denying CSX's Petition for Rehearing has not been reported.

JURISDICTION

On January 26, 1989, the Seventh Circuit dismissed the railroad's appeal as moot. As neither the district court nor the Seventh Circuit had the power to compel the return of the Pontokratis, "any review of the district court's determination of the amount of release bond [would be] an 'empty rite'." 866 F.2d at 957, 1989 A.M.C. at 870. Rehearing was denied on March 9, 1989.

While Petitioners suggest that this Court has jurisdiction under 28 U.S.C. sec. 1254(1), Respondents submit that the Seventh Circuit was correct and this controversy remains moot. This contention is more fully explained in Reasons for Denying the Writ set out below.

STATUTES AND RULES INVOLVED

Supplemental Rule C. Actions in Rem: Special Provisions

Rule C(1)(a)—

(1) When Available. An action in rem may be brought:

(a) To enforce any maritime lien;

STATEMENT OF PERTINENT FACTS

This case arises out of the collapse of CSX's single leaf bascule railroad bridge upon the shipowner's motor vessel Pontokratis on May 6, 1988 while the ship was navigating on the Calumet River in Chicago. The shipowner, Folkstone Maritime, Ltd. (Folkstone), filed suit against CSX on May 9, 1988. On May 11, 1988, CSX filed its Answer to the Complaint and asserted a counterclaim against the shipowner and a claim designated as a counterclaim against the Pontokratis *in rem* and caused the vessel to be arrested the same day.

As the railroad demanded security of $24,000,000 to secure the release of the vessel which, in its damaged condition, was worth but $4,580,000, Folkstone sought a hearing under Rule E(5)(a) of the Supplemental Rules for Certain Admiralty and Maritime Claims to fix the security required to release the vessel from arrest.

On May 20, 1988, the district court heard testimony of Demetri Antippas, a naval architect and marine consultant experienced in the appraisal of vessels, by deposition, and

Leonidas Moustakis, managing director of Ocean Freighters, Ltd., Piraeus, Greece, as to the Pontokratis' value following the accident of May 6. CSX offered the testimony of Harry J. Ottaway of New York, an experienced vessel appraiser. CSX also offered the testimony of David A. Novick, a bridge construction engineer, who testified the subject railroad bridge would cost approximately 12.1 million dollars to replace. Stephen K. Ramsey, CSX's engineer of bridges and buildings testified the cost of demolishing the bridge and cleaning the site will approximate $1,060,000. Folkstone contended the amount of security should be limited to the value of the vessel after the accident while CSX argued that it was entitled to security of twice the amount of its alleged damages, but sought a bond in the "area of $15,000,000."

Using sales of comparable vessels, and adjusting for variations in the freight market, Leonidas Moustakis expressed the opinion that the pre-accident market value of the vessel was $8,000,000. Mr. Dimitri Antippas opined that the precasualty value of the Pontokratis was $7,982,039. Mr. Ottaway, using sales of comparable vessels opined the sound value was $9,000,000, but the sales he used for comparison were made at the height of the freight market, and he made no adjustment for the decline in the market between February and May.

The district court found that on the date of the Pontokratis' arrest, she had been substantially damaged, was unseaworthy, and not marketable as a trading vessel. Efforts were underway to return the vessel to trading at the least possible loss taking into account the cost of repairs, the cost of towage to a shipyard, and the time to be lost during the course of repairs.

Estimates of the cost of repairs varied from shipyard to shipyard between 3 and 3.5 million dollars. The cost of towage varied, depending upon the distance of the shipyard, from $250,000 to $461,000. Time for repairs varied from shipyard to shipyard. The least cost of towage and repairs is 3.25 million dollars. Temporary repairs to make the vessel "towworthy" were estimated at a minimum of $20,000. While in the shipyard, additional expenses of superintendence, agency, surveys, crew, and security, which were not included in the shipyard repair cost, were estimated to be between $150,000 and $350,000.

On May 27, 1988, the district court issued its opinion and order setting the principal sum of the bond required to release the Pontokratis from *custodia legis* at $4,580,000. The district court held that Supplemental Rule E(5)(a) supersedes 28 U.S.C. sec. 2464 and is a valid rule of civil procedure that must be applied. The district court also held that valuation of the Pontokratis must be based on her damaged condition at the date of arrest. On June 2, 1988, CSX's Motions for Reconsideration or, in the alternative, for certification under 28 U.S.C. sec. 1292(b) were denied, although the district court did amend its opinion in some typographical particulars.

On June 3, 1988, the railroad appealed to the Seventh Circuit Court of Appeals. On June 6, 1988, Folkstone filed its vessel release bond and requested the clerk to issue a Writ of Restitution ordering the Marshal to release the vessel and also accept the filing of a cost bond of $250 required by Local Admiralty Rule 13. The clerk declined to issue the Writ of Restitution notwithstanding the provisions of Supplemental Rule E(5)(c).

On June 9, 1988, Folkstone sought an order from the district court directing the Clerk to issue a Writ of Resti-

tution and approve a cost bond, but the district court denied this motion holding that it had lost jurisdiction because of the docketed appeal. An emergency motion was filed in the Seventh Circuit on June 13, 1988, and on June 15, 1988, the court ruled that the district court retained jurisdiction to perform this ministerial act in furtherance of its order of May 27, 1988.

On June 16, 1988, the district court ordered the clerk to issue a Writ of Restitution and accept Folkstone's cost bond. CSX's motion to stay release of the Pontokratis pending appeal was denied by the district court. CSX's Second Notice of Appeal was filed the same day. CSX's Emergency Motion in the Seventh Circuit to stay the district court's order was also denied that afternoon. The ship was released from *custodia legis* on June 16, 1988 after having been under arrest for thirty-eight days while CSX's counsel sought to have the shipowner post a bond of at least $15,000,000 to release the Pontokratis, which was worth $4,580,000 at the time of her arrest.

Although the Pontokratis left the United States, the railroad's appeal remained pending. During oral argument, the court, on its own initiative, questioned whether the appeal was moot in light of the vessel's departure. On January 26, 1989, the Seventh Circuit dismissed the appeal as moot. CSX's Petition for Rehearing was denied on March 9, 1989.

REASONS FOR DENYING THE WRIT

I.

SUMMARY OF ARGUMENT

In dismissing the railroad's appeal, the Seventh Circuit applied the principle that the exercise of judicial power requires the existence of an actual case or controversy at all stages of appellate review. Where a decision would mean nothing to the litigants because changed circumstances preclude a court from granting any relief, the issue on appeal is moot and must be dismissed. The Seventh Circuit recognized that since the Pontokratis was released on bond pursuant to the district court's order and left the territorial jurisdiction of the court, review of the decision would be an "empty rite" as neither court possessed the power to recall the vessel.

The Seventh Circuit reasoned that since the Pontokratis was freed of CSX's maritime lien by transfer of the lien to the bond, the vessel could not be rearrested on the same claim. As the rule protects the interests of subsequent lienholders and facilitates the free movement of maritime commerce, it has been uniformly applied in this Court and the active admiralty courts of appeal and district courts. Therefore, review of whether the district court was correct in releasing the Pontokratis pursuant to Supplemental Rule E(5)(a) was meaningless. As the rights of the parties concerning security can no longer be affected, further consideration of this issue would result in no more than an advisory opinion. Folkstone submits that the Seventh Circuit properly decided that the issue was moot.

II.

AS THE RIGHTS OF THE LITIGANTS CANNOT BE AFFECTED, THE SEVENTH CIRCUIT CORRECTLY RECOGNIZED THAT CSX'S APPEAL WAS MOOT.

The analysis of whether an issue presented for appellate review is moot begins with the proposition that "federal courts are without power to decide questions that cannot affect the rights of the litigants in the case before them." *North Carolina v. Rice*, 404 U.S. 244, 246 (1971). The mootness doctrine requires that "an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed." *Steffel v. Thompson*, 415 U.S. 452, 459 n.10 (1984). *See also Sosna v. Iowa*, 419 U.S. 393, 402 (1975). Stemming from the "case or controversy" requirement of Article III of the Constitution, issues on appeal must present "a real and substantial controversy admitting of specific relief through a decree of conclusive character." *Aetna Life Insurance Co. v. Haworth*, 300 U.S. 227, 240-41 (1937), to assure both adversity between the parties and remedial power of the court. In contrast, the moot case seeks "a judgment on a pretended controversy, when in reality there is none, or a decision in advance about a right before it has been actually asserted and contested, or a judgment on some matter which, when rendered, cannot have any practical effect upon a then existing controversy." *Ex Parte Steele*, 162 F. 694, 701 (N.D. Ala. 1908).

Where a reviewing court loses the ability to give relief because of a change in the controlling facts, the appeal is rendered moot. *See De Funis v. Odegaard*, 416 U.S. 312, 319-20 (1974). Such situations may arise when a court finds that it cannot undo what has been done, *Jones v. Montague*, 194 U.S. 147, 153 (1904); *Dan Caputo Co. v. Russian River County Sanitation Dist.*, 749 F.2d 571,

573-74 (9th Cir. 1984), or where a change in legal status makes any decision a nullity. *See Murphy v. Hunt*, 455 U.S. 478, 481-82 (1982).

> It necessarily follows that when, pending an appeal from the judgment of a lower court, and without fault of the defendant, an event occurs which renders it impossible for this court, if it should decide the case in favor of the plaintiff, to grant him any effectual relief whatever, the court will not proceed to a formal judgment, but will dismiss the appeal.

Mills v. Green, 159 U.S. 651, 653 (1895). In such cases, "there is no binding order that can be given which would change the relationship between the [litigants]. . . ." *Potomac River Ass'n., Inc. v. Lundeberg Maryland Seamanship School, Inc.*, 402 F.Supp. 344, 351 (D. Md. 1975).

A. The Release Of The Pontokratis On Bond By Order Of The District Court Discharged Her From CSX's Maritime Lien And Precludes Rearrest On The Same Claim Thereby Mooting The Appeal.

In the present instance, CSX seeks to execute an alleged maritime lien stemming out of the accident with the bridge. *See* G. Gilmore & C. Black, *The Law of Admiralty* 498 (2d ed. 1975). The maritime lien is a substantive right, not part of the procedural law of admiralty. *Saylor v. Taylor*, 77 F. 476, 479-80 (4th Cir. 1896), which is executed only by the use of *in rem* procedure in a federal court sitting in admiralty. *The Moses Taylor*, 71 U.S. (4 Wall.) 411 (1867); *The Hine v. Trevor*, 71 U.S. (4 Wall.) 555 (1867). Existence of the lien is an essential predicate to the institution of an *in rem* action. *The Rock Island Bridge*, 73 U.S. (6 Wall.) 213, 215 (1867); *Amstar Corp. v. S.S. Alexandros T.*, 664 F.2d 904, 908, 1981 A.M.C. 2697, 2703 (4th Cir. 1981). CSX invoked this pro-

cedure through use of Supplemental Rules C and E. *See* Supplemental Rule C(1)(a) F.R.Civ.P. (action *in rem* may be brought to enforce any maritime lien).

These rules also provide the procedure for release of property and vessels on security. Release of a vessel on the posting of security transfers the lien from the vessel into the fund, discharges the vessel from the lien, and precludes rearrest of the vessel. *United States v. Ames*, 99 U.S. 35, 41-43 (1878). As Professors Gilmore and Black pointed out:

> With respect to a lien in suit the effect of the release is to transfer the lien from the ship to the fund represented by the bond or stipulation. The lien against the ship is discharged for all purposes and the ship cannot again be libeled *in rem* for the same claim.

G. Gilmore & C. Black, *supra*, at 799. First expressed in American courts prior to the Civil War, *see The White Squall*, 29 F.Cas. 1052, 1053 (S.D.N.Y. 1857) (No. 17,570); *The Union*, 24 F.Cas. 535, 537 (S.D.N.Y. 1857) (No. 14,346), this rule has been uniformly applied by this Court and by courts in nearly all circuits. *See United States v. Ames*, *supra*, at 40-42; *Industria Nacional Del Papel, C.A. v. M/V Albert F.*, 730 F.2d 622, 1985 A.M.C. 1437, 1441 (11th Cir. 1984), *cert. denied*, 469 U.S. 1037, 1985 A.M.C. 2397 (1984); *Alyeska Pipeline Service Co. v. Vessel Bay Ridge*, 703 F.2d 381, 384, 1983 A.M.C. 2719, 2721-22 (9th Cir. 1983), *cert. dismissed*, 467 U.S. 1247, 1984 A.M.C. 2401 (1984); *Overstreet v. Water Vessel Norkong*, 706 F.2d 641, 643 n.2 (5th Cir. 1983); *United States v. Ohio Valley Co.*, 510 F.2d 1184, 1189-90, 1975 A.M.C. 1477, 1486 (7th Cir. 1975); *United States v. Tito Campanella Societa di Navigazone*, 214 F.2d 457, 458, 1954 A.M.C. 1519, 1520 (4th Cir. 1954); *Hawgood & Avery Transit Co. v. Dingman*, 94 F. 1011, 1013-14 (8th Cir. 1899); *Maritima Antares, S.A. v. M/V Essi Camilla*, 633 F.Supp. 694, 695-96,

1987 A.M.C. 498, 499 (E.D. Va. 1986); *Globe Barge, Inc. v. Johness Hunter, Inc.*, 1986 A.M.C. 1989, 1993 (E.D. La. 1986); *Southern Oregon Production Credit Ass'n v. O/S Sweet Pea*, 435 F.Supp. 454, 458, 1977 A.M.C. 638, 643 (D. Ore. 1977); *Morris v. Ulizio*, 4 F.Supp. 920, 921, 1934 A.M.C. 70, 71-72 (D. Del. 1933); *J.K. Welding Co. v. Gotham Marine Corp.*, 47 F.2d 332, 335, 1931 A.M.C. 407, 408 (S.D.N.Y. 1931); *The Gasconier*, 8 F.2d 104, 105-06, 1924 A.M.C. 1245, 1246-47 (E.D.N.Y. 1924); *The Comanche*, 1923 A.M.C. 201, 203 (W.D. Wash. 1922); *The Mutual*, 78 F. 144 (D. Conn. 1897); *The William F. Mc Rae*, 23 F. 557, 558 (E.D. Mich 1885); *The Old Concord*, 18 F.Cas. 642, 643 (E.D. Mich. 1870) (No. 10,482). *Cf.* Supplemental Rule C(4) advisory committee note (no point in publishing notice of arrest after release on security as "the vessel is freed from the claim of the plaintiff and no other interest in the vessel can be affected by the proceedings").

The policies supporting this rule are both obvious and salutary. By transferring the maritime lien to the bond, the owner receives the benefit of the return of his vessel unencumbered by the lien while the lienholder has the advantage of a specific security not subject to the claims of other lienors, *J.K. Welding, supra*, at 335, 1931 A.M.C. at 410, without the depreciation occurring while a seized vessel remains in *custodia legis*, *United States v. F/V Fortune*, 1987 A.M.C. 2351 (D. Alaska 1987), and the risk of possible loss of the vessel. *Collins Machine Works v. The Ocean Mist*, 1977 A.M.C. 1139 (E.D. Va. 1977). On the other hand, allowing rearrest on the lienholder's claim of insufficient security impairs the rights of other lienholders or subsequent purchasers of the vessel. *See Hawgood & Avery Transit, supra*, at 1014 (impairment of the rights of other lienholders); *Southern Oregon Production, supra*, at 458-59, 1977 A.M.C. at 644 (protection of bonafide purchasers); *The Union, supra*, at 537 (prejudice to bonafide

purchasers). *Cf. The Frank G. Fowler*, 17 F. 653 (2d Cir. 1883) (maritime liens later in time have priority under the inverse order rule). Moreover, rearrest would subvert the policies supporting the Limitation of Liability Act, 46 U.S.C. secs. 183-189, by allowing recoveries *in rem* larger than the value of the vessel after the owner has successfully established his right to limitation. *See Maritima Antares, supra*, 633 F. Supp. at 696, 1987 A.M.C. at 500. *Cf. Ohio Valley, supra*, 510 F.2d at 1190 n.13, 1975 A.M.C. at 1487.

CSX seeks to equate the rule of the *The Rio Grande v. Otis*, 90 U.S. (23 Wall.) 458 (1875) with the judicial power to decide the railroad's appeal. In *The Rio Grande*, defendants questioned the power of the Circuit Court of Appeal to adjudicate the existence of libellant's lien for repairs because of the marshal's mistake in releasing the vessel pending appeal. It is important to note that the appellate court had neither the vessel nor a release bond before it when it reversed the district court. In holding that an accidental, fraudulent, or improper removal of the *res*, or release on security does not destroy jurisdiction, this Court was speaking to ability to adjudicate the merits of the libellant's lien.

In the present case, a 4.58 million dollar bond has been posted for release of the Pontokratis. CSX's alleged lien has been transferred to the bond. The Seventh Circuit did not need to ask whether it or the district court possessed *in rem* jurisdiction. It is also clear that the court did not answer that question. No one has doubted the jurisdiction of the district court to decide the merits of the collision claim.

In contrast, the *Rio Grande* and its progeny deal with the jurisdiction of courts that possess neither the *res* seized or a substitute. The jurisdictional question posed in the cases cited by Petitioner presuppose the absence of both

in enquiring whether *The Rio Grande* might apply. CSX incorrectly argues that the ability of the district court to adjudicate a maritime lien in an *in rem* proceeding confers the power to rearrest a vessel previously discharged from a maritime lien through the posting of bond. There is no conflict between the rule that release of a vessel on bond transfers the maritime lien to the bond thereby precluding rearrest on the same claim and the rule of *The Rio Grande*. The Seventh Circuit followed the controlling law and correctly found that inability to recall the vessel rendered the appeal moot.

B. Folkstone's Presence *In Personam* In The District Court Cannot Be Translated Into Additional Security.

Likewise, Folkstone does not dispute its presence *in personam*. CSX has a right to a recovery *in personam* for a deficiency should it prove Folkstone's negligence. *See* G. Gilmore & C. Black, *supra*, at 801. Additionally, the railroad has a right to appeal both *in rem* and *in personam* when the decision on the merits of the underlying collision case go against it. However, appeal of the bond issue does not depend on whether Folkstone is present *in personam*. The Seventh Circuit considered mootness by examining the bond issue in terms of its ability to grant relief. The railroad did not and cannot show how any court could grant its request for additional security. *Cf. Thyssen Steel Corp. v. Federal Commerce & Navigation Co.*, 274 F.Supp. 18, 1968 A.M.C. 1582 (S.D.N.Y. 1967) (process *in rem* may be served only within the district); *Impala Trading Corp. v. Hawthorne Lumber Co.*, 200 F.Supp. 261, 1962 A.M.C. 2021 (S.D.N.Y. 1961) (district court in New York could not order the sale of cargo in Honduras). As the Seventh Circuit pointed out, dismissal or striking of pleadings "would not translate into any

additional security for the Railroad in this action." *Folkstone Maritime, Ltd. v. CSX Corp.*, 866 F.2d 955, 958, 1989 A.M.C. 862, 871 (7th Cir. 1989).

CONCLUSION

In creating issues where none exist, CSX ignores the nationally uniform rule in admiralty that release on bond discharges the vessel from the maritime lien precluding arrest on the same claim along with the Seventh Circuit's clear statement that "any review of the district court's determination of the amount of release bond [would be] an 'empty rite', and therefore moot." *Folkstone, supra*, 866 F.2d at 957, 1989 A.M.C. at 870. As neither the court of appeals nor the district court can fashion any relief that would result in additional security, the appeal is moot. Respondents respectfully submit that the issue remains moot and that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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